89-14

No. _____

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In The

Supreme Court of the United States

October Term, 1989

JOAN WARD,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether the Third Circuit Court has misinterpreted 42 U.S.C. §2000e-16(c) by declaring the United States Post Master General to be the appropriate defendant in Title VII actions involving Postal employees.

Whether or not there is an exception created to Fed.R.Civ.P. 15, through 42 U.S.C. §2000e-16(e), and, therefore, the Third Circuit Court erred in not allowing the plaintiff to amend her complain.

Whether the Third Circuit Court has erred by not taking all of the circumstances into consideration when deciding whether or not to allow the plaintiff to amend her complaint.

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No. _____

In The

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October Term, 1989

JOAN WARD,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE ,

Respondent.

On Petition For A Writ Of Certiorari
To The Third Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

Joan Ward, Petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Third Circuit Court of Appeals entered on March 21, 1989, upholding the decision of the United States

District Court For The District Of New Jersey dismissing the Petitioners Complaint entered on October 24, 1988.

OPINION BELOW

The opinion of the District Court is reproduced in the Appendix to this Petition beginning at App. p. A-1.

A Judgment-Order was entered in the Court of Appeals on March 21, 1989, and on April 27, 1989 the Court ordered a stay until June 19, 1989.

JURISDICTION

A Judgment-Order was entered on March 21, 1989 by the Court of Appeals. A timely motion for a stay was made and the stay was issued on March 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. §2000e-16(c) reads in relevant part "... may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropiate, shall be the defendant."

2. 42 U.S.C. §2000e-16(e) reads in relevant part "Nothing contained in this Act shall relieve any Government agency or official of its... primary responsibility to assure nondiscrimination in employment...."

3. Federal Rule of Civil Procedure 15(c) reads in relevant part "...An amendment changing the party against whom a claim is asserted relates back if... within the period provided by law for commencing the action... the party... (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits... (2) knew or should have known that, but

for a mistake...the action would have been brought against him."

STATEMENT OF THE CASE

The Petitioner, Joan Ward, was fired from her job as a letter carrier for the Plainfield Branch of the United States Postal Service. Alledging discrimination, a complaint was filed with the EEOC. A hearing examiner concluded that she was discriminated against and the agency appealed. On appeal, petitioner lost.

A suit was filed in District Court against the United States Postal Service. The Government made a motion to dismiss for lack of jurisdiction contending that the proper defendant was the United States Post Master General.

Petitioner maintained that she did name the proper defendant, or, in the alternative, that she should be allowed to amend her complaint.

The District Court ruled that the

wrong defendant was named and that any amendment made would not relate back. On appeal, the Circuit Court upheld the decision of the District Court.

REASONS FOR GRANTING THE WRIT

This entire matter hinges on who the proper party defendant is in Title VII actions brought as a result of federal sector employment. In the instant case we are dealing with the United States Postal Service (USPS) however, the determination of this case will impact upon millions of federal employees.

There can be no dispute that Title VII, which creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of these rights, is an issue of national importance. It is an embarrassment that a double standard has been created. Private sector cases are made easy while federal sector cases

are not even heard on the merits because of a trap woven into the very fabric of the system.

In recent years the federal courts have taken the view that the "agency head" is the proper party defendant in Title VII cases, to the detriment of many litigants. Williams v. Army and Air Force Exchange, 830 F. 2d 27 (3d . Cir. 1987); Bates v. Tennessee Valley Authority, 851 F. 2d 1366 (11th Cir. 1988); Ellis v. United States Postal Service, 784 F. 2d 835 (7th Cir. 1986).

While the courts recognize that their interpretation of the law creates "harsh results", Lubniewski v. Department of the Navy, 682 Fed. Supp. 462, 464 (N.D.Cal. 1988), they have plunged forward denying honest litigants the right to have their cases heard on the merits.

The decisions have become so convoluted that attorneys, and pro ses, alike are confused. Some decisions hold against

the naming of individuals, McGuinness v. United States Postal Service, 744 F. 2d 1318 (7th Cir. 1984); Canino v. United States Equal Employment Opportunity Commission, 707 F. 2d 468 (11th Cir. 1983), the reliance upon the government agency to supply the proper name, Williams, Supra. at 833, to rely upon the court's interpretation as to who the proper party defendant is, Daly v. United States Department of the Army, 869 F. 2d 593, 594 (3d Cir. 1988), or to rely upon the EEOC's interpretation of who the proper defendant should be as in the instant case.

Attorneys, and especially pro se plaintiffs, must have an appropriate guideline for determining who the proper party defendant should be since it more than obviously changes from case to case. The EEOC thought that they had managed to put a halt to these meritorious claims being dismissed on technicalitities when

in September of 1987 they put in their Complaint Processing Manual the mandate that all matters be captioned with the name of the proper party defendant.In the case before this Honorable Court, their final decision listed the USPS as the defendant. Either they are right and the District Court is wrong, or, they made a grave error and are looking at a lawsuit being brought against them.

It is imperative that the Court make a clear interpretation of the defendant should be in these cases. Additionally, easy access to knowing the answer must be had. With a short statute of limitations period, thirty days, there is no real opportunity for extensive research or discovery. The decisions as they stand now are having a chilling affect on the ability of complainants to get legal counsel. Taking one of these cases is like accepting an invitation to be sued for malpractice.

It is very crucial that the courts do not continue to make it an automatic dismissal when they have determined that the incorrect defendant has been named. The facts of each case should be examined so that the cases will not fall by the waistside unnecessarily. For instance, the petitioner complained that the acts of discrimination were continuous. Thus, the statute of limitations would be running along with the continuous acts. Then, an amendment, if allowed, would not have been barred because it would have related back to the filing of the original complaint.

Even of more importance, this Court must show the lower courts that an exception to the Rules has been carved out by the framers of Title VII so that litigants would be guaranteed their day in court.

The federal courts have refused to follow the clear dictates of 42 U.S.C. §2000e-16(e).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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(201) 753-2079
Attorney for Petitioner

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In The

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE THIRD CIRCUIT COURT OF APPEALS

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APPENDIX A

Opinion of the United States District Court for the District of New Jersey, dated October 24, 1988

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit dated March 21, 1989

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOAN WARD,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

Civil Action
No. 88-1356

OPINION

BARRY, District Judge

Plaintiff Joan Ward brings this civil action under Title VII of the Civil Rights of 1964, 42 U.S.C. §2000e ("Title VII") and the Rehabilitation Act of 1973, 29 U.S.C. §791. Plaintiff claims that defendant United States Postal Service (hereinafter "the Agency") unjustly terminated her employment because of her sex and physical handicap. She appeals a final decision of the Equal Employment Opportunity Commission ("EEOC"), dated

February 22, 1988, affirming the final agency decision dated June 26, 1986, finding no discrimination based on sex or physical handicap.

This opinion resolves, in defendant's favor, its motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12. The Agency asserts that (1) plaintiff failed to name the proper party and cannot now amend her complaint to do so and (2) plaintiff failed to serve the defendant as required by Fed. R. Civ.P. 4.

In a civil action for redress of grievances brought under Title VII, "the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. §2000e16(c). Title VII further provides that such civil acyion can only be brought "[w]ithin thirty days of receipt of notice of final action" taken on plaintiff's complaint. Id. The procedural requirements of 42 U.S.C. §

2000e-16 are applicable to actions brought against United States agencies under the Rehabilitation Act. 29 U.S.C. §794a(a)(1).[1]

Plaintiff filed her complaint in this court on March 22, 1988, within the statutory thirty day period. She did not name the head of the agency --the Postmaster General --as the defendant, as is required by Title VII; instead, she named as the defendant, as is required by Title VII;

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1. The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16)...shall be available, with respect to any complaint under section 791 of this title, to any employee...aggreived by the final disposition of such complaint.

See also Consolidated Rail Corporation v. Darrone, 465 U.S. 624, 627 n. 1 (1984).

2. Plaintiff argues that Title VII is, at the least, ambiguous as to whether the proper defendant should be the individual head of the agency, as defendant claims, or the agency itself, as plaintiff contends. Plaintiff's Br. at 3-5. The Court of Appeals for the Third Circuit has rejected plaintiff's

instead, she named as the defendant the United States Postal Service.[2] Furthermore,plaintiff neglected at that time to serve the summons and complaint on any parties required to be served under Fed. R.Civ.P. 4(d)(4)-(5): the head of the agency, the United States Attorney for this district, and the Attorney General of the United States. Plaintiff served the United States Postal Service on April 8, 1988 and served the United Staes Attorney for the district on July 1, 1988 there is no record of service upon the Attorney General, although plaintiff's counsel represents that service was effected by certified mail on July 18, 1988. Gargano Aff. ¶5.

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position, Williams v. Army and Air Force Exchange, 830 F. 2d 27,29 (3d Cir. 1987), other judges in this district have rejected that position, see Johnson v. United Postal Service, Civ. No. 85-5596, slip op. at 3-4 (D.N.J. Sept. 24, 1986), and I have previously rejected that position. Odom v.

Plaintiff clearly did not institute suit against the proper party, the Postmaster General, within the thirty day period. Her claim can thus survive the agencies motion to dismiss only if she can amend her complaint to include the Postmaster General, and if that amendment relates back to the time when the original complaint was filed. For the reasons that fillow, I find that the complaint may not be so amended.

Schiavone v. Fortune, 477 U.S. 21 (1986), the Supreme Court of the United States addressed the plaintiff's request under Fed. R.Civ.P.15 to amend his complaint so as to name the proper party as defendant. The Court enumerated the requirements which

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United States Postal Service, Civ. No. 85-5686, slip op. at 2 (D.N.J. Jan. 13, 1988). Needless to say, I reject that position here.

must be satisfied before such an amendment will relate back to the date the original date was filed:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it;and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id. at 29.

Any attempt by plaintiff to amend her complaint now so as to name the Postmaster General could not relate back to the filing of the original complaint, because the fourth prong of Schiavone is not satisfied in this case. Although plaintiff filed this action within the statutory thirty-day period, she failed to timely notify any person or

entity required to be notified under Fed. R.Civ.P. 4(d)(4)-(5) or 42 U.S.C. §20000 e-16(c). Service was never effected on the Postmaster General, and service on either of the other parties listed in Rule 4--the United States Attorney and the Attorney General--was not made until three and one-half months after Title VII's thirty-day period had expired.[3] Had

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3 Plaintiff contends that the commencment and prosecution of her EEOC charge against the Postal Service put the Postmaster General on notice of plaintiff's claim. Plaintiff's Br. at 7-8. However, the Third Circuit in Williams applied the Rule 15 requirements to a Title VII case in which the agency was named in the EEOC charge, but the head of the agency was not named in the complaint. The Williams court did not equate the presence of the agency before the EEOC with the naming of the agency head in the judicial complainr, 830 F.2d at 30 n.2 (noting that only service of the judicial complaint constitutes notice), and accordingly, I reject plaintiff's argument.

plaintiff served notice on either the United States Attorney or the Attorney General during the 30-day period, the Postmaster General would be deemed to have had timely notice and, therefor, I would have permitted the complaint to be amended to add the Postmaster General as a party, even at this late date. See Fed.R.Civ.P. 15(d) (equating, for relation back purposes, service upon the Attorney General and the United States Attorney with service upon the proper defendant where such proper defendant is a U.S, agency or office thereof). Plaintiff, however, did not do so here.

The Third Circuit has recently addressed the relation back issue under circumstances similar to those present here. In Williams v. Army and Air Force Exchange, 830 F. 2d 27 (3d Cir. 1987), plaintiff filed suit within Title VII thirty-day period, but named as defendant

the agency (AAFES) rather than the head of the agency or the Secretary of Defense. Id. at 28.[4] Service was made on the Attorney General and on the United States Attorney nine days after the thirty-day period had run. Id. at 29. Noting that none of the parties listed in Fed.R.Civ.P. 4(d)(4)-(5) had been served within the thirty-day limitation period, the court held that an amendment of the complaint to name the proper individual defendants would not relate back because the substitute defendant had not been served within the limitation period. Id. The court recognized that

> the results of Schiavone are particularly unfortunate in this case which involves such a short statute of limitations (30 days) and an untutored litigant. But amelioration of these harsh results is for the Rules Committee, not for this court.

Id. at 30.

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4 Plaintiff obtained counsel only three days prior to the expiration of the thirty-day period. 830 F. 2d at 28.

In the instant matter, plaintiff served the substitute defendants not nine days late, as in Williams, but rather three and one-half months late. Moreover, the plaintiff in Williams obtained representation only three days before the thirty-day period was to expire, and was thus proceeding pro se for most of the limitations period; the Third Circuit, which recognizing the harsh result of Schiavone under these circumstances, nonetheless denied relation back. 830 F. 2d at 30-31. In contrast, plaintiff here has been represented by present counsel since August 1983. Gargano Aff., ¶2.

For the reasons stated above, I grant defendant's motion to dismiss the complaint on the grounds that the proper defendant is not named and amendment of the complaint to do so is now time barred.

MARYANNE TRUMP BARRY
U.S.D.J.

Dated: October 24, 1988

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5 I would echo the Third Circuit's strong suggestion to federal agencies that they follow HHS's lead in including in their right-to-sue letters a clear description of the proper parties to be named as defendants in civil actions brought subsequent to administrative proceedings. Williams, 830 F. 2d at 31. It does not appear that the right-to-sue letter issued Ward included such information.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5895

JOAN WARD,

Appellant

v.

UNITED STATES POSTAL SERVICE

Appeal from the United States District
Court for the District of New Jersey
D.C. Civil Action No. 88-1356
(Honorable Maryanne Trump Barry)

Submitted March 17, 1989

Before: MANSMANN, GREENBERG and SCIRICA,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that based on the opinion of this court in Williams v. Army and Air Force Exchange Service, 830 F.2d 27 (3d Cir. 1987), the judgment of the district court be and is hereby AFFIRMED.

Each side to bear its own costs.

BY THE COURT,

_____

Attest:

_____
Sally Mrvos, Clerk

March 21, 1989